

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Parts 2 and 25 of the	)	ET Docket No. 98-206
Commission's Rules to Permit Operation	)	RM-9147
of NGSO FSS Systems Co-Frequency with	)	RM-9245
GSO and Terrestrial Systems in the Ku-	)	
Band Frequency Range	)	
	)	
Amendment of the Commission's Rules	)	
to Authorize Subsidiary Terrestrial Use	)	
Of the 12.2-12.7 GHz Band by Direct	)	
Broadcast Satellite Licensees and Their	)	
Affiliates; and	)	
	)	
Applications of Broadwave USA, PDC	)	
Broadband Corporation, and Satellite	)	
Receivers, Ltd. to Provide a Fixed Service	)	
In the 12.2-12.7 GHz Band	)	

**REPLY TO OPPOSITIONS TO THE PETITION FOR  
RECONSIDERATION OF THE SATELLITE  
BROADCASTING AND COMMUNICATIONS ASSOCIATION**

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September 18, 2002

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**REPLY TO OPPOSITIONS TO THE PETITION FOR  
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The Satellite Broadcasting and Communications Association ("SBCA"), by its attorneys and pursuant to Sections 1.429(g) and 1.4(h) of the rules of the Federal Communications Commission ("FCC" or "Commission"), 47 C.F.R. §§ 1.429(g) and 1.4(h), hereby submits this Reply to the oppositions filed by MDS America, Incorporated ("MDS") and Northpoint Technology, Ltd. and Broadwave USA, Inc. ("Northpoint") to SBCA's Petition for Reconsideration (the "Petition") of the Commission's decision in the *Second Report and Order*<sup>1</sup> in the above-captioned proceeding to adopt technical and service rules for

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<sup>1</sup> *Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range*,  
*Footnote Continued*

terrestrial fixed Multichannel Video Distribution and Data Service (“MVDDS”) operations in the 12.2-12.7 MHz (“12 GHz”) band.

As demonstrated in SBCA’s Petition, the regulatory scheme for MVDDS adopted by the Commission unlawfully permits MVDDS operations to interfere with DBS and therefore does not fulfill the fundamental requirement that MVDDS not cause harmful interference to DBS operations in the 12 GHz band. Among other things, the Petition demonstrates that the MVDDS technical and service rules: (i) unlawfully allow MVDDS entrants to cause harmful interference to DBS service providers and existing and new DBS subscribers; (ii) unlawfully place the burden of mitigation upon DBS subscribers; and (iii) provide no quantitative standard for distinguishing between “permissible” and “harmful” interference caused to DBS subscribers. SBCA’s Petition addressed specific decisions adopted in the *Second Report and Order* which SBCA contends are arbitrary and capricious and inconsistent with the Commission’s own rules. Nothing in the oppositions of MDS or Northpoint refutes these points.

#### **I. THE ISSUES RAISED IN SBCA’S PETITION HAVE NOT BEEN REFUTED BY THE OPPOSING PARTIES**

As explained in SBCA’s Petition, the Commission adopted a number of decisions in the *Second Report and Order* that were inconsistent with its prior articulated positions in the preceding administrative documents in ET Docket No. 98-206. In attempting to justify its

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Memorandum Opinion and Order and Second Report and Order, 17 FCC Rcd 9614 (2002) (“*Second Report and Order*”). SBCA has filed a Petition for Review with the U.S. Court of Appeals for the District of Columbia Circuit of both the First Report and Order as well as the Memorandum Opinion and Order in this docket. The court has issued an order holding the proceedings in abeyance, pending the Commission’s resolution of the petitions for reconsideration of the *Second Report and Order*. *Satellite Broad. Comm. Ass’n v. FCC*, No. 02-1236 (D.C. Cir. filed July 22, 2002). All oppositions to petitions for reconsideration filed in ET Docket No. 98-206, RM-9147 and RM 9245 on September 23, 2002, will hereinafter be short cited.

contention that DBS providers and subscribers must take responsibility for mitigating interference from MVDDS entrants, for example, the Commission contended that the current DBS systems are not consistent with the broadcasting-satellite service (“BSS”) Plan for Region 2 and thus not entitled to protection from interference caused by existing and future Fixed Services (“FS”) in the 12 GHz band under footnote S5.490 beyond that which the Commission now deems appropriate.<sup>2</sup> This interpretation, however, is contrary to 20 years of the Commission’s own rulings and those of the courts, which have confirmed the conversion of FS to *de facto* secondary status in the 12 GHz band vis-à-vis DBS.

In addition, until the release of the *Second Report and Order*, the Commission had consistently asserted in this proceeding that it would “define a permissible level of increased DBS service outage that may be attributable to MVDDS that *shall not be exceeded*.”<sup>3</sup> In other words, the Commission proposed to adopt a maximum level for outages – as opposed to a minimum level – which would allow MVDDS operations to “cause up to 10% increased unavailability to BSS.”<sup>4</sup> The final rule adopted in the *Second Report and Order*, however, effectively provides no set limit on outages. Rather, the 10 percent increased unavailability standard is viewed as a starting point which results in wildly fluctuating outage increases from one geographic location to the next, because it was arbitrarily based on averaging disparate markets.

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<sup>2</sup> *Second Report and Order* at 9652 n.216.

<sup>3</sup> *Amendment of Parts 2 and 25 of the Commission’s Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range*, First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 4096, 4196 ¶ 267 (2000) (“*First Report and Order*” or “*FNPRM*”) (italics added).

<sup>4</sup> *Id.* at 4197 ¶ 269.

The Commission has similarly asserted throughout this proceeding that the limits it would adopt would ensure that harmful interference will not be caused to DBS services by MVDDS entrants. Yet the Commission has failed to provide any objective, quantifiable measure of what constitutes harmful interference; nor has it provided a workable mechanism for detecting (or enforcing compliance) when such interference occurs.

MDS's opposition fails to address the core issues raised in the SBCA Petition. As a starting point, contrary to MDS's contention, the Petition addressed arguments and decisions that were raised for the first time in the *Second Report and Order* and that were inconsistent with the Commission's prior actions and proposals. Accordingly, this is not a situation in which SBCA "simply restate[d] [previous] objections" or where "full opportunity for all affected parties to comment has been amply afforded."<sup>5</sup> Indeed, no party to these proceedings could have anticipated the Commission's about-face on the legal significance of footnote S5.490. For the most part, MDS simply restates the findings contained in the *Second Report and Order*, embellished with conclusory statements that the Commission acted reasonably and is entitled to deference on spectrum issues. Not surprisingly, MDS fails to accord the Commission such deference on the technical issues that it contends were resolved unfavorably to MDS.<sup>6</sup>

On the all-important issue of harmful interference, MDS asserts that it is the Commission's role to define what constitutes harmful interference, yet misses the point in

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<sup>5</sup> MDS Opposition at 4 (*citing Regulatory Policy Regarding the Direct Broadcast Satellite Service*, Memorandum Opinion and Order, 94 FCC 2d 741, 747-48 (1983)).

<sup>6</sup> See Petition for Reconsideration of MDS America, Incorporated of the *Second Report and Order* (filed June 24, 2002), seeking, among other things, higher EIRP limits and higher EPFD limits for MVDDS operations.

SBCA’s Petition that the Commission failed to do just that.<sup>7</sup> Like MDS, Northpoint parrots the Commission’s conclusory position that any increase in outages caused by MVDDS under the Commission’s EPFD levels would not approach harmful interference levels – but adds that “careful dish selection, placement or shielding may be necessary in rare instances.”<sup>8</sup> Northpoint further contends that requiring such mitigation from future DBS customers is consistent with the first-in-time, first-in-right principle that governs co-primary services.<sup>9</sup> Northpoint is wrong. As explained in SBCA’s Petition, FS in the 12 GHz band has always been treated – both by the Commission and the courts – as secondary to DBS by virtue of footnote S5.490 and the policies underlying the adoption of DBS. In any event, under the first-in-time rule, existing DBS licensees are the first co-primary *licensees* in the band and both they and their subscribers – whether these subscribers exist today or sign up tomorrow – are entitled to protection from interference caused by subsequent entrants in the band, such as MVDDS.<sup>10</sup>

On the issue of increased outages to DBS caused by MVDDS, MDS suggests that the “trade-off” for introducing MVDDS into the 12 GHz band is “a few minutes of extra outage,” yet ignores the fact that the Commission’s own figures show that increases of 20-30 percent, or more, totaling hundreds and in some cases even thousands of minutes of increased outages in individual markets, will occur under its contrived EPFD formula.<sup>11</sup> While MDS contends

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<sup>7</sup> MDS Opposition at 7.

<sup>8</sup> Northpoint Opposition at iv.

<sup>9</sup> *Id.*

<sup>10</sup> As explained in Commissioner Martin’s dissenting statement, the decision to limit the first-in-time protection to existing DBS customers “is a significant departure from the established principle that new users of spectrum must not impede or interfere with existing uses that serve the public interest.” *Second Report and Order*, 17 FCC Rcd at 9820 (citation omitted).

<sup>11</sup> See *Second Report and Order* at 9762-81.

that “it is quite a stretch” to assume that DBS consumers “would notice, or would much care if they did notice” such outage increases,<sup>12</sup> SBCA posits that DBS subscribers who pay a monthly fee for a state-of-the-art, premium video distribution system would care very much about having to accept increased outages, particularly increases on the order of magnitude predicted by the Commission’s own model.<sup>13</sup>

## II. CONCLUSION

For the reasons set forth above and in SBCA’s Petition, SBCA respectfully requests that the Commission reconsider and modify its *Second Report and Order* to provide effective and meaningful protection for DBS providers and their subscribers against harmful interference caused by MVDDS operations or, if such action is not feasible, that it rescind the authorization for MVDDS to operate in the 12 GHz band.

Respectfully submitted,

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<sup>12</sup> MDS Opposition at 11.

<sup>13</sup> In Seattle, for example, the Commission predicts an increase of 2762 minutes of outages for the satellite at 61.5 degrees west longitude. *Second Report and Order* at 9762-81. Indeed, if an increase of 2700 minutes does not qualify as a “tangible detrimental impact” or “harmful interference” or whatever triggers the so-called “safety valve” (*see id.* at 9641-42 ¶ 68), then how many more minutes of increased outage caused by MVDDS operations will it take to achieve such impact?

## CERTIFICATE OF SERVICE

I, Theresa L. Pringleton, hereby certify that on this 18th day of September, 2002, I caused copies of the foregoing **Reply to Oppositions to the Petition for Reconsideration of the Satellite Broadcasting and Communications Association** to be mailed via first-class postage prepaid mail to the following:

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